

Taking Land: Compulsory Purchase and the Regulation of Land in Asia-Pacific Countries

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The government use of compulsory purchase and land use control powers appears to be increasing worldwide as competition for usable and liveable space increases. The need for large and relatively undeveloped space for agriculture and conservation purposes often competes with the need for shelter and the commercial and industrial development accompanying such development for employment, product manufacture and distribution, and other largely urban uses. The free market does not always (some would say, often) result in a logical and equitable distribution of land use and the attendant public facilities necessary to serve the use of land. One function of government is therefore to regulate the use of private land for the health, safety and welfare of its citizens, and to help provide roads, water, sanitation and other public facilities, as well as schools, parks, airports and the like. Accomplishing the former is generally done in accordance with some form or level of plan. Accomplishing the latter often requires the exercise of compulsory purchase powers, providing public land or interests in land in order to construct such public facilities or infrastructure.

The Asia-Pacific region and its rapid urbanisation has generated a need for both land use control and the use of compulsory purchase powers. The same rapid urbanisation and the need for accompanying public facilities has generated area-wide interest in the mechanics (rather than the theory) of compulsory purchase and related land use control mechanisms. While there are certain commonalities among the 11 countries that form the basis of our comparative study, there are differences as well, some of them (such as the ratio of public and private land

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ownership) fundamental. The purpose of our study was to summarise the principal compulsory purchase and land use control systems in the 11 countries that make up the basis of our comparative study, and to attempt to draw some parallels and note some differences among them. However, any comparative study of law and administrative practice is bound to be somewhat general if truly comparative. Our study was no exception.

What follows in the next part are the major themes that emerged from our study. The practices of the individual countries of the study are then summarised, with explanation and analysis of the laws applicable to compulsory purchase and land use control in each country.

I. Major Themes

A. Land Use Control

Virtually every country studied has some mechanism for the control of private land use, particularly those uses most often associated with urbanisation: residential, commercial, industrial and institutional uses of land. These mechanisms range from the relatively detailed to the relatively broad-brush, including private land ownership; national, regional and municipal land use statutes; zoning; building regulations; and common law. What follows is a summary of the major themes that emerge from examining each Asia-Pacific country's concepts of land use and planning.

B. Ownership of Land

There is some private ownership of land or rights in land in most of the countries studied. In countries like the United States, most developable land, and virtually all land in urban areas, is privately owned. Much the same is true in New Zealand and Australia. However, in a significant number of countries—Malaysia, People's Republic of China, Hong Kong and Singapore—the State owns virtually all of the land, though in Hong Kong, it is theoretically possible for a citizen to acquire the equivalent of a fee simple interest in government land through adverse possession over a 60-year period. There is no record of anyone having ever done so, however. State ownership has considerable implications for the regulation of land use. In those States where the State owns most of the land, private development takes place almost exclusively on leased land with the government as lessor. The lease provides an added, sometimes the principal, method of control through lease covenants, often of a sophisticated nature, as in Hong Kong. Indeed, in the People's Republic of China and Singapore, the government retains the power to modify unilaterally the terms of the lease. In Hong Kong, the government may reclaim leased land for a public purpose, after paying compensation, and a lessee may obtain a relaxation of lease restrictions on the payment of a premium.

C. Statutory Framework

The majority of the countries studied provide for land use controls through a national statute that either imposes a minimum level of land use control or sets out a framework for regional and local control, or both. Indeed, only the United States appears to be virtually silent on national land use policy respecting the private use of land, although virtually every state has an enabling Act that permits local land use controls through zoning. This, of course, may be due principally to the federal nature of the United States, where most powers of an internal nature reside with the states rather than with the national government, coupled with the country's comparatively large land mass (only the People's Republic of China and Australia are comparable in this sense) and historic distrust of land use control in all but urban areas. Japan is a typical example of a country with national legislation that both sets policy and provides minimum standards. Most urban areas are required to undertake a minimum level of land use control. Each is further required to use roughly the same dozen use zones in regulating land use. Most, like Taiwan, further require consistency, more or less top-down, among national, regional and local land use regulatory schemes, with the national government setting broad policy and the local government implementing it at the construction and development level.

D. Plans and Planning

Virtually every country integrates some sort of land use planning into the control of land use and development. Some, like Japan and Thailand, have national plans. Others, like the United States, have mainly local plans where there is often only the most rudimentary of plans even at the local level. Still others, like Australia, exercise the planning function at the state or regional level. Most countries require conformance with the appropriate level of plan document, and further require the compliance of the next governmental tier down with the plan immediately above. Thus, Taiwan's three-tiered planning system begins with the national, flows to the regional, and then to the local, with the higher tier guiding the lower.

E. Zoning

In a majority of the countries studied, the implementation of land use controls comes at the local level, through some sort of zoning. Korea, Japan, Taiwan and Hong Kong make it clear that such zoning must conform to the applicable, usually local, plan or planning document. The same is true with respect to most US states through either court decision or zoning enabling Act, though conformance with plans, if any, is often more honoured in the breach. Typically, such zoning divides the jurisdiction of a local government into various residential, commercial/business and industrial zones, sometimes with open space, agricultural and institutional zones as well. The uses permitted in each zone are found in a local (sometimes guided by national, as in Japan) zoning ordinance, resolution or rule, together with a process, if any, for changing the zones upon petition of the landowner/lessee/user of a parcel within a particular zone. In some of the countries studied, such as Japan and Korea, the national government imposes a

standard set of zoning districts on all local governments. In others, like the United States, the choice of districts remains in the discretion of local governments, which may choose not to zone at all. In Hong Kong, on the other hand, the zone-based development plans govern the land use of most areas.

F. Building Regulations

A surprising number of countries—Japan, Korea and Taiwan—regulate buildings as well as land use by means of a national statute. In others, such as the United States, building codes are the most localised of land development controls. The result, of course, is considerable uniformity (and efficiency of construction and development) in those countries with national codes, such as Japan, and considerable diversity, often accompanied by wasteful retooling for development in those countries with local codes that are only partly ameliorated by national models, as in the United States.

G. Courts and Common Law

The United States appears to be alone in its reliance on vast numbers of cases in the shaping of the land use regulatory framework, although a few also appear in Australia, Singapore and Hong Kong. This may be due largely to the common law traditions in these countries, together with the history of private rights to develop land, whether through leasehold or fee simple ownership.

H. Regulatory Taking

In the United States, since 1922 at least, a town planning or land use regulation that goes too far may be treated by courts the same as a physical taking or compulsory purchase. Usually, to be so treated, the landowner must have been deprived by regulations of all economically beneficial use of the subject parcel of land. Similar 'regulatory taking' theories appear in Japan and Korea. In Japan, where a town planning zone designation 'takes' all future use and requires cessation of existing uses, the landowner is entitled to compensation. In Korea, a designation that prevents all construction similarly requires landowner compensation.

I. Indigenous Peoples

The accommodation of indigenous peoples, their rights and traditional practices, often clash with town planning and land use regulatory schemes that are directed primarily at land development issues. In particular, Australia and New Zealand are dealing with this emerging land use issue. Australia now allows compensation for the loss of Aboriginal title in certain circumstances, and case law shows that those circumstances remain to be finalised, despite some legislation. In New Zealand, if the government has no more use for acquired land that was once Maori, that land is supposed to be offered to the trustees of the tribe that originally owned it. The government, however, often retains the land.

J. Colonial Heritage

The land use planning schemes of many countries are rooted in colonial practices imported from outside the country. This sometimes results in an overlay of outside influence over traditional notions of property, particularly if the basic real property law of the country remains rooted in its pre-colonial history. Australia, New Zealand, Singapore, Korea and the United States are examples of countries dealing with some of these issues. For example, New Zealand, Singapore and parts of Australia use a town planning system similar to that which has characterised land use control in England (through town and country planning legislation) for nearly a century.

K. Common Problems

Principal among the problems that commonly arise under the various land use planning and control systems is enforcement. The pace of development has been swift in many Asian countries, and violation of planning policy and regulation is common, particularly in Thailand and Taiwan. Often there is a concomitant loss of open space and agricultural land to more urban forms of development, as reported in Korea and Thailand. On the surface, there appear to be fewer enforcement problems in Singapore, Japan and the United States. Australia has two methods of enforcement: its municipal councils criminally prosecute breaches, and any person can bring a civil case against another to enjoin the action through the torts of nuisance or negligence. Taiwan and Thailand report a lack of meaningful public participation in the process such as can be found in common law countries.

L. Eminent Domain

Every country in the study claims the right of government to take or reclaim private property. Without such a right, public works of any kind would be extremely difficult to undertake. There is virtually no private landowner defence to such a governmental exercise of compulsory purchase or reclamation, absent some clear evidence of bad faith. The only remedy, as appears below, is compensation, and even this is not necessarily guaranteed. What follows are some general themes that emerged from the study.

M. Source of Authority

While generally held to be a natural attribute of sovereignty, virtually every country provides some written authority for exercising its compulsory purchase powers, generally phrased as some sort of limitation on that power. The majority of countries provide such articulation/limitation in a constitution, as in the United States, Japan, Taiwan, Malaysia and Thailand. Many constitutional limitations are based on the United States' Fifth Amendment, which states that the government cannot take private property for public use, without just compensation. Australia's federal Constitution provides limitations only for federal exercises of the power, and state constitutions are by and large silent. Neither the People's Republic of China nor Singapore has constitutional provisions on compensation, but both countries allow for compensation through individual legislative Acts. Singapore's

Land Acquisition Act of 1966, for example, gives specific instructions for the process of land acquisition and the requests for and appeals of compensation amounts. This makes protection tenuous, however, because those laws could be amended or repealed at any time, leaving land occupiers unprotected from these governments' landholding policies because no clear constitutional protection exists. The process for exercising compulsory purchase powers, however, is almost universally a matter of national or, where relevant, state statutory law.

N. Public Purpose and the Extent of Power

One would expect the extent of the power of compulsory purchase to depend upon the particular country's view of private rights in land: the more private rights are recognised, the weaker the power of compulsory purchase. Our study does not necessarily validate this presumption. Either by common law (US) or by statute and practice (Malaysia, People's Republic of China, Australia, Singapore and Korea) most of the countries make broad statements of public purpose as justifications for the exercise of compulsory purchase powers. However, the People's Republic of China and especially Hong Kong, where there is virtually no fee simple private ownership of land, contain limitations on the power of eminent domain. The People's Republic of China limits the taking of interests in land from collectives. Hong Kong sets out specific purposes for which leaseholds may be appropriated, although these are sufficiently broad and numerous that they cover any 'public purpose'. Hong Kong terms such compulsory purchase as resumption, and the People's Republic of China views it as 'reacquisition'. Australia, on the other hand, finds a need to force citizens to be socially and environmentally responsible, without an even balance being struck with a constitutional protection of private property at the state level. The Australian High Court has now decided what is required of the citizen who is sacrificing property for the benefit of the wider community via a particular government programme, and to what compensation that citizen is entitled. The Court found that, if the Commonwealth obtains any benefit or advantage from a land acquisition, whether or not the Commonwealth makes use of that benefit, the original owner deserves compensation for the loss of that benefit (in this case, mining rights to the land).¹

O. Compensation

Virtually every country provides some measure of compensation to the private owner of rights in property for the interests taken by compulsory purchase. In many countries, such as the United States, Australia (limited to federal acquisitions), Korea and Malaysia, compensation provisions are found in their constitutions. Other countries, such as Singapore, provide for compensation by statute. However, the level and circumstances of compensation vary widely. The People's Republic of China and Australia provide compensation largely for raw land value only. Moreover, the People's Republic of China provides for compensation legislatively, on a fact-specific basis. Thus, for example, one province provides compensation of five or six times the value of a three-year average output for

¹ See *Newcrest Mining (WA) Ltd v. Commonwealth of Australia* (1997) 147 ALR 42.

compulsorily taken agricultural land. Many of the countries studied provide for resettlement costs (People's Republic of China, United States, New Zealand and Singapore), though the method varies widely. Some provinces in the People's Republic of China, for example, provide for the cost of relocation plus up to one month's lost wages for displaced workers. Others provide little or no compensation in particular circumstances (Singapore, People's Republic of China and Australia), though Australia provides increased compensation up to an additional 10 per cent of market value for 'solatium': 'intangible and non-pecuniary disadvantage resulting from the acquisition'.² A very few provide for compensation for a so-called 'regulatory taking' as, for example, when a governmental regulation prevents virtually all economically beneficial use of a parcel of land.³

Japan is one of the few countries to use the idea of 'land readjustment', whereby the State returns to the landowner a stake in the 'combined project' for which the landowner's land was compulsorily taken. Malaysia and Thailand are considering the concept of exchanging government land for newly appropriated land. Thailand's problems with its backlog of appropriated land and its inefficient methods of appropriating that land may be answered by Japan's system or by that of Taiwan. If a landowner in Taiwan does not want monetary compensation for a zone expropriation, the government may allow for 'offset land' (land remaining after construction is complete) to be given as compensation.

P. Due Process

Most countries articulate a need for some minimum process that guarantees certain procedural rights to the landowner. Several of the countries set out a broad right of due process in their constitutions (US, Malaysia, Taiwan, Korea and Singapore) although in at least one country (Singapore) the courts have rendered such process unnecessary by rewriting their statutes to not require compliance with the due process clause. Some countries require negotiation between landowner and government to precede some or all exercises of eminent domain (US, Thailand and Singapore), and most countries provide for negotiation at some stage of the process. Virtually every country requires notice to be given to the occupier/owner of the land (or interests therein) to be acquired.

Most countries also provide a process for appealing against, if not the declaration of public purpose, then at least the process or the compensation award. Most also require at least one public hearing. Some countries provide a specific tribunal for appeal purposes (Hong Kong, New Zealand and Singapore). Others grant extensive compulsory powers to a super-agency that does the bulk of the government 'condemnations' (as in Singapore with its powerful Urban Redevelopment Authority).

² See Australia Land Acquisition and Compensation Act, s. 44.

³ See the previous discussion under 'Regulatory Taking'.

II. Country Summaries

A. Australia

Australia began planning municipalities in the late 1800s to provide its citizens with residential areas unaffected by industrial smoke or other nuisances.⁴ Since the 1920s, many planning schemes began to focus more on environmental conservation and historic preservation. These planning schemes map what is permitted, what requires permission, and what is prohibited in all sections of cities, states and territories. Once a state creates its general planning scheme, that scheme is separated into state and local sections.⁵ If a municipality wants to vary the scheme based on its unique environmental, cultural heritage or natural disaster concerns, it must create its own overlay zones to the plan or place conditions on its planning permits.⁶ Rezoning and permission for certain projects in discretionary land use zones require public notice in all cases and environmental impact assessments for major developments.⁷ Major planning concerns taken into account at this point include such things as public amenity, pollution protection,⁸ environmental conservation⁹ and heritage preservation.¹⁰ An appeals process exists for parties dissatisfied with initial decisions,¹¹ be they developers or members of the public impacted by proposed development.

⁴ See Robert Freestone, *Model Communities: The Garden City Movement in Australia* (1989, Thomas Nelson Australia, Melbourne). Parliamentary debates at this time referred to the town-planning movement as a justification for land use reforms. For a detailed history of planning law in the Australian territory of Victoria, see M Raff, 'A History of Land Use Planning Legislation and Rights of Objection in Victoria' (1992) 22 *Monash University Law Review* 90.

⁵ See Dees Eccles and Tannetje Bryant, *Statutory Planning in Victoria* (1999), for a more detailed explanation of Victoria's planning system. See also Tannetje Bryant, R Byard and G Testro, *Planning and Environment Service* (Victoria) (1995, Butterworths, Sydney) (loose-leaf service).

⁶ See Planning and Environment Act 1987 (Vict.).

⁷ See *ibid.*, s. 12; and M Raff, 'The Renewed Prominence of Environmental Impact Assessment' (1995) 12 *Environmental and Planning Law Journal* 241 at p 251.

⁸ See Planning and Environment Act 1987 (Vict.), s. 84B, which requires that the Victorian Civil and Administrative Tribunal (VCAT) take account of and give effect to any relevant State environment protection policy declared in any Order made by the Governor-in-Council under s. 16 of the Environment Protection Act 1970.

⁹ See *Department of Conservation and Natural Resources v. Robson* (1995) 15 *Admin App Trib Rep* 35.

¹⁰ Town and Country Planning Act 1961 (Vict.).

¹¹ In Victoria, the appeals body is the Victorian Civil and Administrative Tribunal; in New South Wales, it is the Land and Environment Court; in Queensland, the Planning and Environment Court; in South Australia, the Environment Resources and Development Court; in Tasmania, the Resource Management and Planning Appeal Tribunal; and in the Australian Capital Territory, the Planning Appeals Tribunal.

The appeals process for compulsory land acquisition is less regimented. The federal Constitution requires compensation for land takings,¹² but who gets that compensation and why remains debatable. A recent High Court decision, *Newcrest Mining Ltd v. Commonwealth of Australia*, found that, for example, a mining company can be compensated for the loss of income for being unable to use cyanide leaching in a fragile environment, but Aborigines cannot obtain compensation from the government for taking that same land for preservation.¹³

While the Australian Constitution limits federal land acquisition and requires some compensation, the state constitutions do not.¹⁴ In Australia, state governments view compulsory acquisition as taking back land previously held privately before the grant of a freehold tenure to private citizens.¹⁵ Compensation is therefore generally limited to the owner's market value of the land¹⁶ and loss of its then use,¹⁷ with damages from nearby public projects or changes in the planning scheme only obtainable through nuisance litigation or other torts.¹⁸ Compensation for regulatory 'expropriation' is generally unavailable, although the High Court seems to be leaning towards such compensation for total loss of economic use.¹⁹ The government can use private land for 'public good' with little difficulty. Public good can include infrastructure such as roads, electrical supply, sewerage and telecommunications, as well as public health, safety and environmental protection. Takings for these goals can include either physical use of the property or loss of the property's title as well as changes in the planning scheme that alter the uses available to a landowner. The landowner's inherent public responsibility, by definition, means expropriation may not have occurred.²⁰

¹² See Australian Constitution, s. 51(xxxi): The Australia Parliament may make laws for the peace, order and good government of the Commonwealth with respect to '[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ...'

¹³ See *Newcrest Mining (WA) Ltd v. Commonwealth of Australia* (1997) 147 ALR 42.

¹⁴ See *New South Wales v. Commonwealth (Wheat Case)* (1915) 20 CLR 54.

¹⁵ Land Acquisition and Compensation Act 1986 (Vict.); Lands Acquisition Act 1989 (ACT); Lands Acquisition Act 1994 (ACT); Lands Acquisition Act 1996 (Northern Territory); Land Acquisition (Just Terms Compensation) Act 1991 (NSW); Acquisition of Land Act 1967 (Queensland); Land Acquisition Act 1969 (South Australia); Land Acquisition Act 1993 (Tasmania); and Land Administration Act 1997 (Western Australia).

¹⁶ See Land Acquisition and Compensation Act 1986 (Vict.), s. 40 ('Market value [is] ... in relation to any interest in land on a particular date ... the amount of money that would have been paid for that interest if it had been sold on that date by a willing but not anxious seller to a willing but not anxious purchaser').

¹⁷ See *Pastoral Finance Association Ltd v. Minister* [1914] AC 1083.

¹⁸ See, for an overview, GM Bates, *Environmental Law in Australia* (4th edn, 1995, Butterworths, Sydney). More detail can be found in H Luntz and D Hambly, *Torts: Cases and Commentary* (4th edn, 1995, Butterworths, Sydney), and Francis A Trindade and Peter Cane, *The Law of Torts in Australia* (3rd edn, 1999, Oxford University Press, South Melbourne and Oxford).

¹⁹ See *Newcrest Mining (WA) Ltd v. Commonwealth of Australia* (1997) 147 ALR 42.

²⁰ *Australian Tape Manufacturers Association Ltd v. Commonwealth* (1993) 176 CLR 480 at p 510 ('In a case where an obligation to make a payment is imposed ... as a genuine

B. *People's Republic of China*

The Chinese Constitution does not provide for compensation for compulsory land acquisition. Because the State officially owns all land, and only allows collectives, businesses and individuals merely to use it,²¹ the government can reclaim its land at any time. The People's Republic of China uses specific legislative Acts, not the Constitution, to calculate damages paid to land users for resettlement and for such individual national projects as building hydroelectric dams or maintaining flood control.²²

There are nevertheless some limits to what land government can seize. For example, land taken from farming collectives or State-owned land that is having its use changed must be used for the State's economic, infrastructure, defence or social service projects, all of which are defined by the federal government.²³ Also, State land bureaux must approve any government use of, and construction on, the land. The failure of either condition results in the failure of the land appropriation.²⁴

The government pays for resettlement costs and for probable or real loss of use, not for how the land might have been used or for emotional loss. The organisation that will use the expropriated land actually pays the compensation. If the present land users must be moved before expropriation, the new users must relocate the old.²⁵ If the original land users move themselves, the new users must compensate them.²⁶ Compensation takes the form of cash, bank deposits or direct replacement of buildings and/or crops. That compensation must be used accord-

adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an "acquisition of property" within section 51(xxxi) of the Constitution ...').

²¹ PRC Constitution (1988), art. 10 ('Land in the urban areas of cities shall be owned by the state. Residential district, reserved district and reserved mountain shall be owned by the collectives.').

²² See eg Rights to the Use of Land Ordinance in Shanxi Gansu Ningxia Remote Area (1944); Compensation Act for Flood Control Construction in Henan Province (1952); Expropriation Act for the Construction of the National Project (1953); Amendment for Country Cooperatives Projects Ordinance (1962); Expropriation Ordinance for National Projects (1982); Field Law of the PRC (1985); Fishery Law of the PRC (1986); Land Administration Law of the PRC (1986); Law on Reinstatement of Land (1988); Law on Compensation, Resettlement Subsidies in Compulsory Land Acquisition for Big or Medium Water Supply and Hydroelectric Power Plants (1991).

²³ Land Administration Law of the PRC, arts 21 and 22. Art. 21 provides: 'When the state needs to requisition land owned by collectives or to use state-owned land for economic, cultural or national defence construction projects and for initiating public works ...' Art. 22 provides: 'Upon approval, construction units may apply for use of land needed for those state construction projects which are listed in the state fixed assets investment plan or which may be built in accordance with state provisions'

²⁴ See Land Administration Law of the PRC, art. 25.

²⁵ *Ibid*, art. 34.

²⁶ *Ibid*, art. 28(1).

ing to a plan prepared by the original land user and approved by the expropriating organisation,²⁷ with strict disciplinary measures for failure to comply.²⁸

Each region sets its rules for how the landowner can spend the compensation and the standards of compensation for resettlement. Calculation of compensation for land is very specific, and is determined by the use of the land before its expropriation and by a multiple of the average amount earned by that land over a set number of years.²⁹ If the land had been used by the State for offices, for the armed forces or for non-profit-making organisations, the State would pay for the material costs of the demolished buildings on the land. If the land is to be used for 'special' purposes, such as for water supply or hydroelectric power plants, different calculations would be used, based on the specific legislation for those land uses.³⁰ Calculations for the loss of residences are based on the material costs of the buildings, and compensation includes residences in the new location, either via rent money or by providing the residence itself.

If land compensation and resettlement payments according to the government formulae still fail to put people back at their original level, restitution follows.³¹ The national government decides all of the values, and national policy dictates what use of the land is most appropriate and by whom.

The land-use planning system in the People's Republic of China appears to revolve around whether land is designated urban, suburban, rural or mountain. All cities are owned by the State. Collectives (local forms of administrative rule) own the suburban and rural areas unless it is designated as State-owned. Because the government owns all of the land and dictates how that land will be used, the government, and not the courts, resolves any land disputes. Thus, the government decides the land use and allows citizens the right to accomplish the government's goal.

C. Hong Kong

In Hong Kong, the government is the sole ground landlord.³² Hong Kong's government, as the landlord and planner for the territory, controls every element of land use through development plans, lease conditions and building control.³³ While the People's Republic of China owns all the land in Hong Kong, the Hong Kong Government manages the property according to its long-term plans for

²⁷ See *ibid*, art. 30 ('all kinds of compensation and resettlement subsidies ... shall not be used for other purposes and shall not be appropriated by any unit or individual').

²⁸ *Ibid*, art. 49. Art. 155 of Criminal Law (embezzlement) applies to cases with no extenuating circumstances, with sentences ranging from fewer than five years' imprisonment to death.

²⁹ See *ibid*, art. 30.

³⁰ See eg Law on Compensation, Resettlement Subsidies in Compulsory Land Acquisition for Big of Medium Water Supply and Hydroelectric Power Plants.

³¹ See Land Administration Law of the PRC, art. 29.

³² The Hong Kong Government was described as the sole ground landlord in *Shun Shing Hing Investment Co. Ltd v. Attorney-General* [1983] HKLR 433 at p 434.

³³ See generally Anton Cooray, 'Town Planning' (Vol. 25) and 'The Environment' (Vol. 11) of *Halsbury's Laws of Hong Kong* (Butterworths Asia, Singapore).

density, location and manner of development. Hong Kong has three population density zones that are maintained through Building Ordinance Regulations³⁴ and lease conditions. The government is able to impose lease conditions when leases are granted, modified or renewed. Lease controls, however, are site-specific. Therefore, zoning changes can only be implemented piecemeal and sometimes slowly, because most leases are for 75 years.

Controls that the Building Authority may impose under the Buildings Ordinance are also site-specific. The Building Authority is, however, able to effect planning-type decisions by requiring any building to maintain the appearance of a neighbourhood.³⁵ The Building Authority also implements the density controls of the site's zone, as set out in the relevant plan made under the Town Planning Ordinance.³⁶ The Building Authority has no control over any change of use of a building, unless it involves any building work, such as structural alterations.

Two types of non-statutory plan³⁷ and two types of statutory plan³⁸ set the stage for development in Hong Kong. The non-statutory plans set out standards and guidelines on such topics as the environment and residential densities, and create medium- and long-term planning strategies for Hong Kong's five sub-regions. These territory-wide or regional plans provide the platform for local statutory development plans. The Town Planning Ordinance allows the Town Planning Board to grant planning permission, as provided by development plans. The planning permission process is facilitated by notes attached to the plans.³⁹

The Town Planning Board reviews contested decisions made by either of the Board's two planning committees. Any applicant aggrieved by a determination of his planning application by the Town Planning Board may appeal to an independent town planning appeal board. The appeal board's decision is final and conclusive. An appeal board's decision may of course be challenged by way of judicial review.⁴⁰ There is no public participation in planning permission hearings. Planning permission is a matter between the applicant/developer and the Town Planning Board. Planning permission may be unqualified or subject to conditions, such as that permission will lapse unless the project begins within three years. The Director of Planning has three methods of enforcement to ensure compliance with planning controls:⁴¹ issuing a notice requiring the development to be done

³⁴ Namely, Hong Kong Building (Planning) Regulations.

³⁵ See Kemal Bokhary, 'Section 16(1)(g) of the Building Ordinance (Cap. 123): A Shooter's Guide' (1989) 19 HKLJ 314.

³⁶ See Hong Kong Buildings Ordinance (Cap. 123), s. 16(1)(d).

³⁷ See Hong Kong Territorial Development Strategy; Hong Kong Planning Standards and Guidelines.

³⁸ Namely, 'outline zoning plans' and 'development permission area plans'.

³⁹ One column for each zone lists permitted uses, and the other column lists uses requiring an application for permission from the Town Planning Board. Anything not listed is never allowed in that zone.

⁴⁰ *Henderson Real Estate Ltd v Wo Chai Wan* (1996) 7 HKPLR 1; (1997) HKLRD 258 is an example of a judicial review application.

⁴¹ Hong Kong Town Planning (Amendment) Ordinance, No 4 of 1991. See Anton Cororay, 'Enforcement of Planning Control in Rural Hong Kong: Reflections on Recent Legislative Reforms' (1992) 1 *Asia Pacific Law Review* 108.

in conformity with the permission granted,⁴² requiring the development to be stopped,⁴³ or requiring the land to be reinstated to its original use.⁴⁴ If the land is not covered by a statutory development plan, there is no need to apply for planning permission. The developer must only meet the requirements of the Building Ordinance and lease conditions.

Because the government owns all the land, and can regain complete control upon the expiration of leases, it rarely exercises its powers of compulsory acquisition. It does, however, occasionally reclaim leased land before the lease expires. The Lands Resumption Ordinance also allows takings if the property has become a health hazard, is needed for national defence, or is needed for a 'public purpose'.⁴⁵ At least one month's public notice is required, and during that time either the landowner or an interest holder may agree to a voluntary sale. With such an agreement, the resumption procedure ends, and the transaction becomes a sale.⁴⁶ Otherwise, the land still reverts to the government at the end of the notice period, but within 28 days the government must begin the compensation procedure.⁴⁷ Compensation is paid on the value of the land (determined by the amount of time left on the lease), the value of any legally built construction on the property,⁴⁸ and the costs of disrupting the owners'⁴⁹ and the neighbours'⁵⁰ livelihoods. An appeal may go to the Lands Tribunal against these amounts (which usually relate to the amount expected if the property were offered on the open market⁵¹) but not against the resumption itself. The land user can also appeal against compensation amounts for takings of easements or parts of his land for roads, railways and airport height restrictions. Compensation for property affected by conservation areas or by changes in land value because of new zoning is rare. Although the Basic Law of Hong Kong requires compensation only at market value,⁵² the government has learned that to speed the acquisition of land it should pay higher compensation than legally required.

⁴² Issued under the Hong Kong Town Planning Ordinance, s. 23(1).

⁴³ Issued under *ibid*, s. 23(2).

⁴⁴ Issued under *ibid*, s. 23(3).

⁴⁵ See Hong Kong Lands Resumption Ordinance, s. 2.

⁴⁶ See *ibid*, s. 4A.

⁴⁷ *Ibid*, s. 6(1).

⁴⁸ *Ibid*, s. 10(1).

⁴⁹ *Ibid*, s. 10(2)(c).

⁵⁰ *Ibid*, s. 10(2)(b).

⁵¹ *Ibid*, s. 6(3).

⁵² See Basic Law, art. 105 ('The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without delay.').

D. Japan

Japan has a multi-tiered system of land planning, from the national to the regional to the municipal level. All levels of land planning are based on public safety and the even distribution of industrial and residential zones, while preserving set percentages of historic and natural areas. The national plan includes such considerations as the use of natural resources, protection from natural disasters, the location and size of urban and suburban areas, industry locales and projections of electricity needs for metropolitan areas.⁵³ Because of the rise of land values in Japan, the country enacted the Land Fundamental Law in 1989, declaring, through policy objectives, the country's vision of organised development while preserving public welfare on multiple levels.

Public welfare also controls the expropriation of private land, which is limited by the Constitution.⁵⁴ Most land expropriation⁵⁵ involves negotiation among the project initiator, the landowner and any other concerned parties, even when it is the type of project listed under the Land Expropriation Law.⁵⁶ The Land Expropriation Law is the general statute governing public use compulsory acquisition, including such infrastructure projects as roads, railways and waste disposal facilities. If the project planner thinks negotiation will be difficult, he can ask for 'recognition' of the project by the Minister of Land Infrastructure and Transport, who then sets the extent of land needed, how it will impact the public and the environment,⁵⁷ the exact list of interested parties⁵⁸ and how much compensation the owner deserves.⁵⁹ The recognition process may require less diplomacy, but it is time-consuming and bureaucratic.⁶⁰ Upon recognition, the project initiator has a year to apply for a 'ruling of acquisition of right' and a 'ruling for evacuation' from the expropriation committee.⁶¹ If any party disagrees with the committee's ruling, that party may request an investigation by the Minister of Construction⁶² and bring a lawsuit if the compensation is insufficient.⁶³

National guidelines decide the compensation required by Japan's Constitution for the public taking of private or public property.⁶⁴ Complete physical loss

⁵³ See Tsuyoshi Kotaka, *Law of Administrative Activities* (1984) pp 79–91; Yoriaki Narita, *Land Policy and Law* (1989, Kobundo, Tokyo) pp 46–74.

⁵⁴ See Japan Constitution, art. 29, 3.

⁵⁵ See Tsuyoshi Kotaka, *Research on Just Compensation* (Miejo Law Series 4, 2000, Seibundo, Tokyo) p 28; Tsuyoshi Kotaka, *Commentary to the Land Expropriation Law* (1980); Michikazu Ozawa, *Interpretation of the Land Expropriation Law* (revised edn, 1995, Gyosai, Tokyo).

⁵⁶ Enacted in 1951 under Japan Constitution, art. 29(3).

⁵⁷ See Land Expropriation Law, art. 20.

⁵⁸ See *ibid*, art. 8(3) proviso.

⁵⁹ *Ibid*, art. 71.

⁶⁰ See *ibid*, arts 36 and 38.

⁶¹ *Ibid*, art. 47-2, para. 2.

⁶² *Ibid*, art. 129.

⁶³ *Ibid*, art. 133.

⁶⁴ See *Guideline of Standard for Compensation for Loss Caused by Acquisition of Land for Public Use* (1967).

of private property receives full economic compensation,⁶⁵ via market value, but nothing for potential economic, subjective, emotional, historical or cultural value.⁶⁶ If any party is dissatisfied with the appropriation of the land or the amount offered in compensation, that person may request an investigation by the Minister of Construction or file a lawsuit. If a public facility is appropriated, the project initiator must rebuild it elsewhere, not just pay the replacement value. A recent decision by the Sapporo District Court is instructive on the definition of replacement value.⁶⁷ The court held the government's taking process relating to the construction of a dam to be illegal, owing to the failure to consider adequately the cultural interests of indigenous Ainu property owners.

Some regulations also lower the value of property by limiting its uses. For example, a regulation that limits the use or lowers the value of a property to prevent disasters will not be compensated because such a regulation has more value in public safety and welfare.⁶⁸ Zoning⁶⁹ and regulations for public works,⁷⁰ maintenance⁷¹ and safety also do not require just compensation because they are seen as forms of public welfare. If the regulation is to protect historical, natural or cultural sites, however, that kind of regulatory taking requires compensation. Compensation is paid for the value of the lost use of the land if an actual loss in property can be proved.⁷²

E. South Korea

The South Korean Constitution guarantees the property rights of all citizens, including just compensation for compulsory acquisition.⁷³ Strict land use planning Acts, such as the Urban Planning Act (UPA) and the Building Act, limit constitutional rights of property ownership, particularly concerning construction. If these restrictions require specific sacrifices by owners, beyond accepted zoning prohibitions, the government may owe compensation, but that is rare. With Korea's small landmass, general limitations on construction are widely accepted.

Orderly urban growth guides most Korean planning decisions, with both safety and aesthetics playing a role. In Korea's system of 'specific use areas', planners

⁶⁵ 'Full compensation' has been determined to mean 'just compensation', under the Land Expropriation Law's adversary doctrine (art. 48(3); art. 49(2)), which is a compromise between the project initiator, the landowner and other interested parties.

⁶⁶ See *Guideline of Standard for Compensation for Loss Caused by Acquisition of Land for Public Use*, art. 7; *ibid*, art. 8(4).

⁶⁷ See *Guideline of Standard for Compensation for Loss Caused by Acquisition of Land for Public Use*, art. 7; *ibid*, art. 8(4).

⁶⁸ See Masami Takatsuzi, 'Study on Property Right' (1962) 38 *Jichi-Kenkyu* 4, 3.

⁶⁹ For an example, see City Planning Law, art. 7.

⁷⁰ See eg *ibid*, arts 53, 54; Readjustment of Town Lots Law, art. 76.

⁷¹ See eg Road Law, arts 4 and 44; River Law, art. 54; Coast Law, art. 7; Port Law, art. 37; and Mining Law, art. 64.

⁷² See Supreme Court, 27 November 1968, 22 *Keishu* 12, 1402.

⁷³ See South Korea Constitution, art. 23, which guarantees citizens' right to property, that property rights must conform to public welfare, and that expropriation and just compensation will be governed by law.

consider the shape and quality of the land to find its best purpose, and then prevent any contrary uses. After dividing the land into urban and non-urban areas, the government further divides the land into four non-integrated categories: residential, commercial, industrial and green.⁷⁴ Each urban area has zoning restrictions on the type, size and location of buildings and their function. The regulations governing land use in each area determine the respective landowner's rights. A landowner will not be compensated for lack of ability to use his land in a manner that the regulations prohibit.

The 'zone system' determines those development regulations. Zoning attempts to spread population, services and land uses evenly, including agriculture, parks and green belts, through four zones: the 'urbanisation control zone', the 'detailed planning zone', the 'metropolitan planning zone' and the 'development restriction (green belt) zone'. Once determined, the UPA provides the specific regulations for the zones. Administrative actions that change a person's land designation may be considered a taking that requires compensation.

Whether compensation must be paid for such restrictions is being debated now, because only a 'restriction of private property for public necessity' warrants compensation under the Constitution.⁷⁵ Interpretations of that phrase vary. If, for example, one owns property that is later rezoned, commentators believe that the owner makes a special sacrifice and is owed compensation.⁷⁶ The government thinks differently: it views rezoning as the constant creation of the expected social boundaries and limitations of land ownership, which do not require compensation.⁷⁷ Under consideration now is the request of people living in the development restriction zone (DRZ), amounting to 2.2 per cent of the national population, for compensation through elimination of the zone because of the low economic value of their property and an arguable lack of 'public necessity' of that type of zone.⁷⁸ Another debate revolves around how much compensation for rezoning is needed. According to the Constitutional Court, compensation for rezoning to a DRZ is based on the loss of the original land use value caused by the new land use restriction.⁷⁹ The Court also found that the landowner's only particular sacrifice related

⁷⁴ See *ibid*, art. 120(2) ('The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.').

⁷⁵ *Ibid*, art. 23(3).

⁷⁶ Yun Heum Park, *A New Lecture on Administrative Law* (1997) p 717; Dong Hee Kim, *Administrative Law* (1997, Park Young Sa, Seoul) p 315; and Nam Jin Kim, *Administrative Law* (1995) p 526. For an argument that it does not require compensation, see Won Woo Suh, *Administrative Law Theory in an Age of Transition* (1997) pp 863–76.

⁷⁷ See Constitutional Court Decision of 3 June 1991 (89 Heon ma 46); Constitutional Court Decision of 16 September 1991 (89 Heon ma 152); Supreme Court Decision of 8 August 1990 (89 bu 2); Ministry of Construction and Transportation, An Opinion to the Constitutional Court Decision of 3 November 1991 (89 Heon ma 213); An Opinion to the Constitutional Petition Regarding Article 21 of the UPA, 11 November 1993.

⁷⁸ For more discussion about this debate, see 1 Do Chang Kim, *General Theory of Administrative Law* (1990) p 588; 1 Yun Heum Park, *A New Lecture on Administrative Law* (1997) p 690.

⁷⁹ See Constitutional Court Decision of 24 December 1998 (97 Heon ba 78).

to the building site, not the surrounding land, and thus only the loss in value of the building site would be compensated.⁸⁰

Another difference relates to the compensation given to those who accept the government's offer through consultation⁸¹ as compared to those who choose adjudication.⁸² When the government wants to physically appropriate private land, the agency involved must both publicly and directly notify local authorities, the landowner, the project contractor and other concerned parties. Upon surveying the land and structures, an offer is made to the owner. Usually the offer is much lower than that which could be obtained through adjudication by a land commission. This is an added concern because the number of acquisitions rose from 96 in 1980 to 2,010 in 1991, due in part to strong economic development and a resultant increase in the number of public projects. The landowners can agree through consultation with the government, or appeal against the land appropriation, its proposed use, the length of that use and the amount of compensation, unless the property is needed for temporary emergency public safety requirements after natural disasters or other major accidents. The latter type of land appropriation cannot exceed six months in duration.

F. Malaysia

While the Malaysian Constitution protects a person's right to own property,⁸³ that right is not absolute. All land is vested in the State, and the State allows citizens to own the land subject to the State's needs. In this regard, only the State is empowered to dispose of State land. The government can prescribe categories of land use on the land's title, impose conditions and restrictions on interests in the land,⁸⁴ and reacquire any land ostensibly needed for the country's economic development, for public needs or for recreational purposes. The government determines land use (agricultural, building or industrial)⁸⁵ when someone buys or leases land, thus ensuring that the use conforms to long-term development plans. The use is documented on the registered document of title.⁸⁶ Aside from allowing the owner to make a living from and enjoy his land, use and enjoyment of land is restricted to that of lawful use and reasonable enjoyment.⁸⁷

The Land Acquisition Act 1960 requires due process for the taking of private land. Government appropriation is considered valid for any public or recreational

⁸⁰ See *ibid.*

⁸¹ See Act on Special Cases Concerning the Acquisition of Land for Public Use and Compensation for Their Loss.

⁸² See Land Expropriation Act.

⁸³ See Malay. Constitution, art. 13: '(1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.'

⁸⁴ See National Land Code 1965, s. 105.

⁸⁵ *Ibid.*, s. 52(1).

⁸⁶ *Ibid.*, s. 78(3).

⁸⁷ *Ibid.*, s. 103.

purpose⁸⁸ or to improve the economic status of Malaysia,⁸⁹ all of which are hard to challenge.⁹⁰ However, the landowner is entitled to a hearing during which he or she may object to the amount of the award or attempt to show *mala fides* on the part of the State. The government rarely loses such cases, but occasionally the government has faced difficulties with the initial application process to acquire land. The specific government agency must prove that the purpose of the compulsory land taking is in the public interest or is for the economic development of the nation, and that the taking is feasible. A new amendment to the Land Acquisition Act of 1991, however, states that, whether or not the government uses the appropriated land as proposed, the appropriation will remain valid.⁹¹ Only if the appropriation is not completed within two years of being gazetted (officially advertised) will the acquisition proceedings be nullified and ownership of the land returned to the private landowner.

Compensation for government appropriation is based on the owner's present and future possible uses (if they are not too remote) for the land under existing planning zones.⁹² The values of similar tracts of land in the area help determine the amount of compensation,⁹³ and compensation is available only for buildings on the land that meet regulation codes.⁹⁴ No law regulates how to determine the amount of compensation, but the guiding principle is to put the claimant back into an economic position equivalent to that before the land was taken.⁹⁵ The First Schedule to the Act explains that compensation is calculated by determining the market value of the land,⁹⁶ any increase or decrease in value because of the anticipated new use, and determining what elements are to be ignored. The landowner or other interested party can contest the amount,⁹⁷ but only if the amount exceeds

⁸⁸ *Ibid*, s. 3(1)(c) (1977).

⁸⁹ See *ibid*, s. 3(b) (1991) (land may be acquired by a State agency 'from any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public ...').

⁹⁰ See *ibid*, s. 8(3).

⁹¹ *Ibid*, s. 68A (1991) ('Where any land has been acquired under this Act, whether before or after the commencement of this section, no subsequent disposal or use of, or dealing with, the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land.').

⁹² See *ibid*, ss. 3(2) and 3A (1997).

⁹³ See *ibid*, 1A of the First Schedule (1997).

⁹⁴ See *ibid*, 3A of the First Schedule (1997).

⁹⁵ See *Pentabir Tanah Daerah Gombak v. Huat Heng (Lim Low & Sons) Sdn Bhd* [1990] 3 MLJ 282.

⁹⁶ See *Kho Choon Jee v. Superintendent of Lands and Surveys, Third Division* [1972] 1 MLJ 265 (market value is 'the price which an owner willing but not obliged to sell might reasonably expect to obtain from a willing purchaser with who he was bargaining for the sale and purchase of the said land').

⁹⁷ See National Land Code, s. 37.

RM15,000⁹⁸ and only if done within a certain time limit.⁹⁹ The burden is on the owner to prove that the amount offered is inadequate.¹⁰⁰ A judge and two land assessors hear the case, and their judgment is final.

The method of compensation in Malaysia may soon be changed. Instead of paying the landowner for appropriated property, the government is considering a system of land exchange within the same area.¹⁰¹ This method may improve the landowner's sense of participation, but it has yet to be implemented.

G. New Zealand

A requiring authority,¹⁰² either through direct negotiations between the government and the owner, or by statute, compulsory requirement for public works or an Environment Court order,¹⁰³ may appropriate land in New Zealand. The defining legislative Acts follow the principles of sustainable management¹⁰⁴ and regulate takings and compensation for public works.¹⁰⁵ If a requiring authority needs the land for a public works or utility, the land can be 'designated'. This means that, once the requiring authority proves its need and the legality of a land taking, through a public notice and hearing process, the designated land can be taken despite objections, so long as its planned use legally fits the area's development plans.¹⁰⁶ The designated land must be acquired for its stated purpose within five years, or the designation lapses.¹⁰⁷ Any interested person can seek a 'resource consent' from someone in control of the land.¹⁰⁸ The resource consent lasts two years.¹⁰⁹

New Zealand does not consider compulsory land acquisition¹¹⁰ as an infringement of property rights, but rather as requiring adequate compensation. Compensation entails economic replacement for the land on the basis of fair market value¹¹¹ and planned use,¹¹² as well as resettlement costs together with a small amount for loss of enjoyment.¹¹³ The government also pays compensa-

⁹⁸ See *Re Yeap Char Ee* [1932] SSLR 94.

⁹⁹ See *Mohd Saperi Mohd Nasir v. Pentadbir Tanah Daerah Alor Gajah* [1997] 5 MLJ 800.

¹⁰⁰ See *Ong Yan v. Collector of Land Revenue, Alor Gajah, Malacca* [1986] 1 MLJ 405.

¹⁰¹ Malaysia is considering introducing land readjustment, as is done in Japan.

¹⁰² A 'requiring authority' is a public, civic body or a private company that carries out public works.

¹⁰³ The Environment Court is a specialist court which reviews takings claims, among other resource management, planning and conservation questions.

¹⁰⁴ See Resource Management Act 1991.

¹⁰⁵ See Public Works Act 1981.

¹⁰⁶ See Resource Management Act 1991, s. 166.

¹⁰⁷ See *ibid*, s. 184.

¹⁰⁸ See *ibid*, s. 88.

¹⁰⁹ See *ibid*, s. 125.

¹¹⁰ Public Works Act 1981, ss. 23–27, explains the compulsory acquisition of land procedures.

¹¹¹ See *ibid*, s. 60(1).

¹¹² *Ibid*, s. 62(2).

¹¹³ *Ibid* ss. 62–68 (compensation); and *ibid*, ss. 72–74 (financial assistance).

tion to affected neighbours, tenants and holders of future estates.¹¹⁴ Objections to the proposed compulsory acquisition are heard by the Environment Court, but the Court does not decide compensation amounts.¹¹⁵ Compensation must be negotiated between the parties or decided by the Land Valuation Tribunal.

If the Environment Court reverses the compulsory acquisition, barring appeals to the High Court, the land must be offered for resale to its original owner, if practicable.¹¹⁶ The Public Works Act 1981 defines 'original owner' as 'the person from whom [the land] was acquired or ... the successor of that person'.¹¹⁷ Otherwise, the land may be offered for sale to adjoining landowners or to the public.¹¹⁸ By default, the land could become Crown land,¹¹⁹ something the indigenous Maori continue to fight because they believe the Crown (or State) originally stole the land from them, and that 'original owner' should mean 'original tribal owner'.¹²⁰

H. Singapore

Singapore's State Lands Act regulates State land,¹²¹ and sets out four methods of alienating land from the State to private owners: fee simple, estate in perpetuity, lease and temporary occupation licence. Two of these methods (the estate in perpetuity¹²² and the lease) are subject to the State's conditions and covenants,¹²³ and the leases cannot exceed 99 years.¹²⁴ The government can change the conditions and covenants at any time, with or without notice, and the land grantee or lessee is bound by the changes.¹²⁵ One method, the fee simple, does not include these conditions, but it is very rare for the State to alienate land in fee simple.¹²⁶ A third method, the temporary occupation licence, is governed by the State Lands Rules.¹²⁷

¹¹⁴ *Ibid*, s. 63.

¹¹⁵ *Ibid*, s. 23(3).

¹¹⁶ *Ibid*, s. 40.

¹¹⁷ *Ibid*, s. 40.

¹¹⁸ *Ibid*, s. 42.

¹¹⁹ *Ibid*, s. 42(3).

¹²⁰ See *Gisborne Ltd v. Smiler*, unreported, Court of Appeal, CA No 182/98, 26 April 1999.

¹²¹ See Cap. 314 (revised edn, 1988). See generally WJM Ricquier, *Land Law* (2nd edn, 1995, Butterworths, Singapore), Vol. 7.

¹²² See Sheridan, *Malaya and Singapore, The Borneo Territories* (1961, Stevens, London), Chapter 13, p 14.

¹²³ See State Lands Act, ss. 4–6; see generally Ricquier, *op cit* n 121, pp 12–13.

¹²⁴ *Ibid*, s. 10 ('The title ordinarily to be issued shall be a lease for a term not exceeding [99] years.').

¹²⁵ See *ibid*, s. 8 ('An assignee of, or any person who becomes a proprietor of any land in Singapore, shall be bound by such exceptions, reservations, or covenants (restrictive or otherwise) contained in the Crown grant or lease, or State grant or lease, irrespective of whether he has notice (actual or constructive) of such exceptions, reservations or covenants.').

¹²⁶ *Ibid*, ss. 14–18.

¹²⁷ See State Lands Rules 1968, rules 19–25.

The Planning Act defines all legal rules of planning in Singapore. The Planning Act includes the 'Master Plan', which is reviewed every five years. It provides the framework for zoning under which the Urban Redevelopment Authority (URA) and private developers work.¹²⁸ Public works and urban planning authorities can submit proposals for changing their area's master plan at any time.¹²⁹ The Planning Act also contains development and subdivision plans.¹³⁰ A landowner cannot subdivide¹³¹ or develop his property in any way that changes the outer appearance of buildings or land without getting permission from the authorities, who look to the master plan.¹³² Permission for any changes also requires a development charge, which is a percentage of the estimated appreciation in the land's value after the development is complete.¹³³ Non-compliance at any level is a criminal offence.¹³⁴

One way that Singapore has been able to retain control over its growth is through the compulsory purchase of land. As of 1975, the State owned about 65 per cent of the nation's land, compared to 49 per cent in 1969, and the trend towards increasing State ownership seems to be continuing.¹³⁵ Much of the planning work of the past 30 years has been accomplished by the URA,¹³⁶ which is responsible for accumulating land, planning future growth and resettlement of those whose land the government takes, preserving history and maintaining property acquired for future plans.¹³⁷ The URA may also declare an area to be an urban development area, thus setting in motion the government's acquisition of the area within three years.¹³⁸ Other public agencies can also appropriate private land if they can prove the land is needed for their functions, such as for roads and other public infrastructure or facilities.¹³⁹ While the Land Acquisition Act requires the government to first attempt private negotiation for land, the courts have ruled that negotiation is too much of a burden. To speed along acquisitions, the government often resorts to compulsory purchase.

Singapore amended its Constitution to eliminate a guarantee of adequate compensation for all compulsorily taken property.¹⁴⁰ Now, the Land Acquisition Act governs compensation. This compensation includes the property's present market value, damage to land still owned by the private party, resettlement expenses for home or business, and title fees. The Land Acquisition Act provides that

¹²⁸ Planning Act, Cap. 232, Pt II, ss. 6–11.

¹²⁹ See *ibid*, s. 7.

¹³⁰ See *ibid*, Pt III, ss. 12–24.

¹³¹ *Ibid*, s. 12(3).

¹³² *Ibid*, s. 3(1).

¹³³ *Ibid* s. 36(1)–(6).

¹³⁴ *Ibid*, ss. 12(4) and 30.

¹³⁵ See Philip Motha, *Singapore Real Property Guide* (2nd edn, 1982, Guins Pty Ltd, Singapore) pp 7–13.

¹³⁶ Established by the Urban Redevelopment Authority Act of 1973.

¹³⁷ See Urban Redevelopment Authority Act, Cap. 340, s. 6 (revised edn, 1990).

¹³⁸ See *ibid*, s. 8.

¹³⁹ See Street Works Act, Cap. 320A.

¹⁴⁰ See Republic of Singapore Independence Act 1965, s. 6. See generally S Jayakumar, *Constitutional Law* (1976, Malaya L. Reu., Singapore).

property to be taken requires public notice and advertising in a gazette.¹⁴¹ Such 'gazetting' is considered sufficient evidence that the property is required by the government.¹⁴² The advertisement in the gazette also sets the date of acquisition by the government.¹⁴³ When the need for the property is particularly urgent, the government can take the land prior to public notice, if the notice is published within a week of taking possession. Only 'interested parties'¹⁴⁴ (which does not include tenants)¹⁴⁵ can apply for compensation, which has no set procedure for allocation or amount. If a party disagrees with the amount offered, that person must object immediately or lose the chance of an appeal. The Appeals Board¹⁴⁶ decides whether to make a payment, and, if so, how much. If the amount is accepted by the interested party, the collector may take possession of the property upon payment of the agreed amount.¹⁴⁷

While the regularity and ease of compulsory purchase are beneficial, the level of compensation has been a cause of concern. In accordance with a formula set out in the Land Acquisition Act, the date upon which the property is acquired determines the rate at which the property will be assessed.¹⁴⁸ The market value is based on retrospective values¹⁴⁹ and the lowest of possible uses, either that for which the landowner used the land, or that for which the government plans to use it.¹⁵⁰ Improvements made to the land two years prior to government acquisition are not taken into account, nor, among eight other factors, are the urgency of its acquisition or the injury caused to the landowner by the land's taking.¹⁵¹

I. Taiwan

Taiwan's three-tiered planning¹⁵² begins with the national, flows to the regional and then to the local, with the higher tier guiding the lower one. The national plan sets the policies for the country and standardises the ideas for regional plans,¹⁵³ which focus on development and natural resource preservation. The national plan, unlike the regional plans,¹⁵⁴ lacks legal stature. The local plans split between

¹⁴¹ See Land Acquisition Act, s. 3.

¹⁴² *Ibid.*, s. 5.

¹⁴³ *Ibid.*, s. 33(6).

¹⁴⁴ *Ibid.*, s. 2.

¹⁴⁵ See Cap. 58 (revised edn, 1985).

¹⁴⁶ See Lands Acquisition Act, s. 23.

¹⁴⁷ See *ibid.*, s. 16.

¹⁴⁸ *Ibid.*, s. 33(1) (1995); *Collector of Land Revenue v. Ang Thian Soo* [1990] 1 MLJ 327.

¹⁴⁹ See the Lands Acquisition Act, s. 33(1) (1995): the property can be assessed at rates from as long ago as 1 January 1986, to as recent as 1 January 1995.

¹⁵⁰ See *ibid.*

¹⁵¹ See *ibid.*, s. 34.

¹⁵² The highest tier is 'land general development planning'; the middle tier is 'regional planning'; and the lowest tier is 'urban planning' and 'non-urban land use planning'.

¹⁵³ Presently, four regional plans exist: Northern, Central, Southern and Eastern Taiwan.

¹⁵⁴ The Regional Planning was promulgated under the Regional Planning Law, enacted in 1974.

regulating land use within the urban and non-urban¹⁵⁵ areas. The urban area¹⁵⁶ is divided into several zones. All land use and development in the zones must conform, or the landowner will be fined and ordered to remove, change or stop using the building or land. Every five years, the government authority reviews the zones: residential, commercial, industrial, agricultural, conservation, administration, culture and education, scenic and specific use zones.¹⁵⁷ However, despite the enforcement mechanisms for these zoning controls, land use violations are evident everywhere, due apparently to the non-binding status of the national plan and the lack of serious enforcement efforts by the responsible government authority.

The public has little chance to comment on any of the processes of land use planning. Aside from a 30-day comment period on creating urban land use zones, landowners have no opportunity to present their opinions. For example, if land is zoned as non-urban, landowners can neither complain nor seek compensation. Instead, the landowners must donate their land and money to the government to establish the non-developable land for environmental protection.¹⁵⁸

While Taiwan's Constitution provides for property rights¹⁵⁹ it says nothing about expropriation. The Land Expropriation Act of 2000 fills that gap with the requirements and methods of compulsory acquisition.¹⁶⁰ Takings are grouped into general land, political and zoning expropriations. General land takings are for specific public needs such as national defence, infrastructure, environmental protection, government facilities, public education and 'others'.¹⁶¹ The only qualification for these public needs is that government or a government-assigned entity must operate them.¹⁶² Political land expropriation enables the State to ban private ownership of certain land, like that within a certain distance from the coast,¹⁶³ or that which is beyond the maximum amount allowed to one owner.¹⁶⁴ Although the law prevents the monopolisation of private land, the government has yet to expropriate land for that reason. Lastly, government can acquire land in any specified zone (urban, old urban, agricultural, conservation or non-urban), in whole or in part, for planned development or improvements.¹⁶⁵

¹⁵⁵ Non-urban zones are managed through the Regional Planning Law and the Rules for the Non-Urban Land Use Control, with options for more than 10 possible zoning categories.

¹⁵⁶ About 444 urban planning areas currently exist.

¹⁵⁷ See the Urban Planning Law, art. 32.

¹⁵⁸ Based on the Rules for the Non-Urban Land Use Control, yet the Regional Planning Law only authorises the Ministry of the Interior to enact these rules by executive order.

¹⁵⁹ See Taiwan Constitution, art. 15 ('the right of property shall be guaranteed to the people').

¹⁶⁰ See the 1930 Land Law, 'Land Expropriation' chapter. See also the Equalization of Land Rights Act, the Urban Planning Law, the Encouragement of the Upgrading of Industry Act, the Science-Based Industrial Park Establishment and Management Act, and the Public Housing Act as further examples of expropriation clauses.

¹⁶¹ See the Land Expropriation Act, art. 3.

¹⁶² See *ibid*, art. 56.

¹⁶³ See *ibid*, art. 14.

¹⁶⁴ See *ibid*, arts 28 and 29.

¹⁶⁵ *Ibid*, art. 4.

The government almost always approves a stated purpose for acquisition, with little public comment. Unless the land is needed for an emergency, defence, transportation, water conservation, sanitation or protection of the environment, the agency must first attempt to negotiate directly with the landowner. Only if negotiations fail will the land be expropriated.¹⁶⁶ Once public announcement of the appropriation is made, the landowner can make no changes to the land for 30 days.¹⁶⁷ The negotiation can include relocation of any improvements found on the land and reimbursement for improvements that cannot be moved.¹⁶⁸ Price is determined by the latest official land price set by the local government together with replacement costs for any improvements.¹⁶⁹ The government land prices relied upon for compensation are often below market prices, and public officials would be punished criminally for offering more than the official prices.¹⁷⁰ Indeed, the Land Expropriation Act does not require market rates,¹⁷¹ and the government rates are set every 1 July. Within 15 days after the expiration of the announcement, the promoter of the new development must pay the compensation.¹⁷² If payment is not made, the appropriation is invalidated, unless the lack of payment is because the landowner refuses to accept the payment, in which case the money will be deposited anyway, and the compensation will still be treated as received.¹⁷³ Objections by neighbours and the landowner as to the appropriation or the compensation amount will be heard and allowed on appeal.¹⁷⁴

In the case of zone appropriation, maps must be filed for approval with the Ministry of the Interior,¹⁷⁵ and affected landowners can comment within 30 days.

¹⁶⁶ *Ibid*, art. 11.

¹⁶⁷ *Ibid*, art. 23.

¹⁶⁸ *Ibid*, art. 5.

¹⁶⁹ As expressly set forth in art. 46 of the Equalization of Land Rights Act, the municipal or competent city/county government shall, for land within their precincts, survey the updates of land price and evaluate the land prices from time to time and promulgate them on 1 July every year. The land prices so promulgated by the municipal or competent city/county government are 'official land price latest promulgated by the government'. *Ibid*, art. 46. See also *ibid*, arts 30, 31, 33 and 34.

¹⁷⁰ Art. 131 of the Criminal Code provides that '[a] public official who, either directly or indirectly, seeks to profit from a function under his control or supervision shall be punished with imprisonment for not less than one and not more than seven years; in addition thereto, a fine of not more than 7,000 Silver Dollars may be imposed'.

¹⁷¹ See Land Expropriation Act, art. 30: 'For expropriated land, compensation shall be paid at the government-promulgated official prices of the current term ... As necessary, an additional percentage may be provided. The additional percentage shall be proposed by the municipal or competent city/county government, in line with prices of normal trading, to the Land Price Evaluation Commission, which will come to a final decision on the grounds of the government-promulgated official prices of the current term.'

¹⁷² *Ibid*, arts 17, 19 and 20.

¹⁷³ *Ibid* art. 26.

¹⁷⁴ *Ibid*, art. 22. Objections are considered by the municipal or city/county government. Appeals may be processed under the Administrative Appeal Law and the Administrative Litigation Law.

¹⁷⁵ *Ibid*, art. 38.

If landowners prefer, they can apply for a percentage of offset land instead of full cash for compensation.¹⁷⁶ Available offset land is defined by whatever is left over after the development is complete, and should be at least 40 per cent of the appropriated land.¹⁷⁷ After the offset land has been allocated, the rest of the unused land is designated for such public facilities as roads, parks and schools.¹⁷⁸ Any remaining land can be sold.

While so many types of legal land acquisition may make public undertakings simple, Taiwan relies heavily on the process without consistently protecting the right to private property. For example, in 1997, the government expropriated 2,275 hectares, and in 1999, the government expropriated 5,893 hectares.¹⁷⁹ Proving need is easy for the State,¹⁸⁰ and constitutional protection has become secondary at best. Other national Acts uphold the Constitution, but are seemingly ignored.¹⁸¹ When the federal government is looking for land to appropriate, landowners, local government agencies and other affected landowners get little to no chance to speak. As a result, until recently, almost all land appropriations have been approved.

J. Thailand

Thailand has divided its land use planning into multiple levels, beginning with a five-year National Economic and Social Development Plan which determines the national framework, by providing guidelines for land use planning at regional, provincial and district levels, as well as town plans. Therefore, all of the regional, provincial, district and town plans are to some extent consistent with one another. Thailand's rapidly expanding population undermines its specific planning laws, especially conservation laws, which are not strictly enforced. While the Town Planning Act of 1975 was designed to control urban land use through zoning, it has not been effective even though it has been amended twice. People buying agriculturally zoned land have converted the land to non-agricultural uses to make it more profitable,¹⁸² with no repercussions.¹⁸³ Agricultural land takes precedence over

¹⁷⁶ *Ibid*, art. 40.

¹⁷⁷ *Ibid*, art. 33.

¹⁷⁸ *Ibid*, art. 44.

¹⁷⁹ From statistics released by the Ministry of the Interior for the years 1997–99.

¹⁸⁰ About 50 years ago, Shih Shang-kuan, a well-known expert in Taiwanese law, said of Taiwan's land expropriation methods: 'Very seldom can one find throughout legislation the expropriation procedures as oversimplified as the Land Law of our country.' Shih Shang-kuan, *The Theory of Land Law* (1951, Cheng-Chung Bookstore) p 522.

¹⁸¹ Land Law, art. 208 ('The land expropriation shall be limited to the scope only as indispensable to promotion of the undertaking.'). Enforcement Rules of Land Law, art. 49 ('Land expropriation shall be carried out within the scope, not against the expropriation objectives at the least possible damage.').

¹⁸² According to the Office of Agricultural Economics of the Ministry of Agriculture and Cooperatives, between 1986 and 1988 the main rice production region (Central Region) lost much of its agricultural land to residential, commercial and industrial areas.

¹⁸³ No laws presently prohibit land subdivisions.

forests,¹⁸⁴ the density of urban centres continues to increase, and the pressures for land increase.¹⁸⁵

The Constitution of Thailand includes the right to private property.¹⁸⁶ The Constitution gives the government the right to compulsory acquisition,¹⁸⁷ but only if a specific law allows acquisition for a specific use.¹⁸⁸ Acquisition must be for the public good, and compensation must be fair and paid within a reasonable period of time.¹⁸⁹

Several specific laws allow for the acquisition of property. The Immovable Property Acquisition Act of 1987 allows the State to expropriate real estate property, and other statutes specifically allow for the acquisition of property for such uses as airports, railways, highways and industry.¹⁹⁰ Agencies follow a series of steps towards acquisition, from requesting that the property be donated, to negotiation for sale, to issuing a royal decree or applying the Immovable Property Act to that specific property. Compensation then entails the government's valuation of the land and its assets, damage to properties, demolition costs of any immovable properties, labour and material costs, inconvenience and a computation of the value of the land prior to acquisition versus its prospective value. Negotiation ensues, with appeals available.¹⁹¹

Because of rising competition for land, negotiations often break down, which can cause endless delays, because the executing agency can only take over the property when the compensation has been fully paid. The appropriation process lacks efficiency, *inter alia*, because of public protests, obstructions to government projects and lack of formulae for calculating compensation amounts.¹⁹² The lack of formulaic methods also means that many experience long delays in receiving their compensation, making landowners less likely to co-operate, and extending the appeals process. Because it takes so long to acquire the amount of land needed, public works projects often take 20 years to complete, leaving some appropriated land to lie unused the entire time. Thailand, like Malaysia, is considering trying

¹⁸⁴ See Office of Agricultural Economics, 'Number of Agricultural Households and Average Farm Size Between 1981–1995' Average farm sizes have continued to shrink between 1981 and 1995.

¹⁸⁵ See Ministry of the Interior, Population Census of 1909, 1919, 1929, 1937 and 1947. Thailand's population increased from 26 million to 61.5 million between 1960 and 1998.

¹⁸⁶ Thailand Constitution, s. 48, cl. 1 ('The property right of a person is protected. The extent and the restriction of such right shall be in accordance with the provisions of the law.').

¹⁸⁷ See *ibid.*, s. 49.

¹⁸⁸ *Ibid.* ('The expropriation of immovable property shall not be done except by virtue of the law specifically enacted for the purpose of ...').

¹⁸⁹ *Ibid.* ('... and fair compensation shall be paid in due time to the owner thereof as well as to all persons having the rights thereto, who suffer loss by such expropriation, as provided by the law').

¹⁹⁰ See eg Airport Authority of Thailand Act 1979, s. 32; State Railway of Thailand Act 1981, s. 37; Highways Act 1992, s. 68; Industrial Estate Authority of Thailand Act, 1979, s. 32.

¹⁹¹ See Immovable Property Acquisition Act, ss. 9, 10, 23, 25 (clause 2) and 28.

¹⁹² Communication from Justice Prapant Subsaeng of the Thailand Supreme Court (undated; on file with authors).

the concept of land readjustment, as is done in Japan,¹⁹³ but whether that will help make the process more efficient and reduce the backlog remains to be seen.

K. *United States*

Land use controls in the United States are generally exercised at the local government level. The most effective of these controls is zoning, which is used by local governments to divide regions into use districts. Statutes permit local governments to divide their jurisdictions into zones with permitted uses and restrictions.¹⁹⁴ Another local land use method that has gained popularity is the subdivision process, which requires an area of land to be completely platted and those plats to be approved before lots can be sold to individuals, who will develop their lot according to the approved plan. Subdivisions must include plans for their own infrastructures and public facilities, as well as dedicating open spaces and public buildings, thus managing local growth and expenditures.¹⁹⁵ In the same vein, developers must often pay impact fees to the community that provides the subdivision with such public facilities as sewers and roads, both on- and off-site, but only if the improvements can be found to be required because of the subdivision.¹⁹⁶ Building (prospective) and housing (retroactive) codes set out minimum standards for the health, safety and welfare of the public.

Some states have reclaimed their land use control¹⁹⁷ through regional¹⁹⁸ or state-wide¹⁹⁹ zoning and planning. Often this is to protect a resource and to control

¹⁹³ This method of the government trading land for land could potentially reduce the State's costs. No legislation specifically supports the concept yet, and it is being run only on a trial basis.

¹⁹⁴ A model Standard Zoning Enabling Act from 1923, drafted by the US Department of Commerce, usually forms the basis for the state statutes.

¹⁹⁵ See Eric Damian Kelly, *Managing Community Growth: Politics, Techniques and Impacts* (1993, Praeger, Westport, CT) p 16.

¹⁹⁶ David L Callies, 'Impact Fees, Exactions and Paying for Growth in Hawaii' (1989) 11 *University of Hawaii Law Review* 295; Brian William Blaesser and Christine M Kentopp, 'Impact Fees: The Second Generation' (1990) 38 *Washington Journal of Urban and Contemporary Law* 55; Julian Conrad Juergensmeyer, *Funding Infrastructure: Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges* (1985, Lincoln Institute of Land Policy Monograph 85-5); and R Freilich and D Bushek (eds), *Exactions, Impact Fees and Dedications* (1995, American Bar Association, Chicago).

¹⁹⁷ See Fred P Bosselman and David L Callies, *The Quiet Revolution in Land Use Control* (1971, US Government Printing Office, Washington, DC); Robert Healy and John Rosenberg, *Land Use and the States* (2nd edn, 1979, Johns Hopkins University Press, Baltimore); Thomas G Pelham, *State Land Use Planning and Regulation* (1979); and John M DeGrove, *Land, Growth and Politics* (1984, American Planning Association, Chicago).

¹⁹⁸ For discussions of these systems and the 'takings' cases challenging them, see Bosselman and Callies, *op cit* n 197; DeGrove, *op cit* n 197; and Fred P Bosselman, David L Callies and John Banta, *The Taking Issue* (1973, US Government Printing Office, Washington, DC).

¹⁹⁹ For example, Hawaii, Florida, Vermont and Oregon.

developments that impact an entire region.²⁰⁰ Also, the federal government has overriding statutes and implementing regulations for clean air²⁰¹ and water,²⁰² for managing coastal zones,²⁰³ and for protecting known flood zones.²⁰⁴ Regulations that leave a landowner without an economically beneficial use require compensation as if the land were compulsorily purchased. Regulations that deprive a landowner of some, but not all, economic use, *may* require compensation, depending upon such factors as the investment-backed expectations of the landowner and the character of the governmental action.

As with land use controls, local, state and federal governments all have the power to acquire land by compulsory purchase. The United States Constitution limits this ability, however, by requiring that such a taking must be for a public use, and the private owner must be justly compensated.²⁰⁵ Compensation is generally calculated for the value of the land and its present improvements (or the loss of value, depending upon the kind of taking involved) at the time of the confiscation, with no consideration given to the future worth of the property after its confiscated use.²⁰⁶ Various local government authorities have the right to condemn private

²⁰⁰ For a general overview, in Japanese, see David L Callies, *Land Use Controls in the US* (1994, trans Makitaro Hotta, Horitsu Bunko Sha, Kyoto). See also, for various analyses of land use law, David L Callies, *Preserving Paradise: Why Regulations Won't Work* (1994, University of Hawaii Press, Honolulu); David L Callies, *Regulating Paradise: Land Use Controls in Hawaii* (1984, University of Hawaii Press, Honolulu); Bosselman and Callies, *op cit* n 197; Daniel R Mandelker, *Environmental and Land Controls Legislation* (1976, Bobbs-Merrill, New York); Phyllis Meyers, *Zoning Hawaii* (1976, Conservation Foundation, Washington, DC); David L Callies, 'Land Use Control in an Island State' (1980) 2 *Third World Planning Review* 187; David L Callies, 'Land Use' (1979) 2 *University of Hawaii Law Review* 167; Tom Dinell, 'Land Use Zoning in a Developing State' (1980) 2 *Third World Planning Review* 195; Daniel R Mandelker and Annette Kolis, 'Whither Hawaii? Land Use Management in an Island State' (1979) 1 *University of Hawaii Law Review* 48; Daniel R Mandelker, *Land Use Law* (4th edn, 1997, Michie Co., Charlottesville, NC); Julian Juergensmeyer and Thomas Roberts, *Land Use Planning and Control Law* (1999, West Group, St Paul, MN); and Peter A Buchsbaum and Larry J Smith (eds), *State and Regional Comprehensive Planning* (1993, American Bar Association, Chicago).

²⁰¹ Clean Air Act, 42 USC ss. 7401–7671q, ELR Stat. CAA ss. 101–618.

²⁰² Clean Water Act, 33 USC ss. 1251–1387, ELR Stat. FWPCA ss. 101–607.

²⁰³ See Coastal Zone Management Act of 1972, 16 USCA ss. 1451–1465, ELR Stat. CZMA ss. 302–319. For general description and comments, see Sarah Chassis, 'The Coastal Zone Management: An Introduction' (1978) *Am. Bar. Found. Res. J.* 153; Fred P Bosselman *et al*, *Federal Land Use Regulations* (1977, Practising Law Institute, New York); Natural Resources Defense Council, *Land Use Controls in the United States* (1975, Dial Press, New York); Daniel R Mandelker, *Environmental and Land Controls Legislation* (1976), Bobbs-Merrill, New York).

²⁰⁴ Federal Disaster Protection Act of 1973, 42 USC ss. 4056 *et seq*.

²⁰⁵ US Constitution, Fifth Amendment. V. For an overview of eminent domain in the US, see Gideon Kanner, *Just Compensation*, and AP Nichols, *The Law of Eminent Domain* (revised edn, 1997, ed E Kelly, Matthew Bender and Co., New York).

²⁰⁶ See eg Haw. Rev. Stat. s. 101–24.

land for such things as housing,²⁰⁷ airports,²⁰⁸ convention centres²⁰⁹ and other public purpose projects. Public utility corporations may also acquire land through compulsory purchase because of their quasi-public functions. To allow for taking immediate possession and use of a condemned property, quick take provisions often require the condemnor to pay a deposit of sorts with the court, which then orders surrender of the property.²¹⁰

A non-negotiable condemnation action usually begins with an agency filing a complaint in court.²¹¹ The complaint must include the government's plans for the land and a specific mapping of it.²¹² The court summons all interested parties to decide on a fair price and to verify that the government will use the land as claimed.

Most federal agencies try to negotiate with landowners during the process of compulsory Purchase.²¹³ The property is appraised, with the owner able to comment on various values that may not be readily apparent. The sales records of comparable properties are checked; replacement costs, loss of business and the fate of tenants are all considered in the compensation process. Often not considered are such things as business goodwill, loss of future business, frustration of plans and costs of removing buildings or fixtures, unless specifically provided for in the statute.²¹⁴ Once an offer is made, either the owner can agree or condemnation proceedings may begin in court.

Not only must the landowner be fairly compensated for the highest and best use of the land, but he must also be given 'due process':²¹⁵ fair notice of the government's intent to acquire the property²¹⁶ and a day in court if he so desires.²¹⁷ In California, for example, if a landowner can prove that the particular agency does not possess appropriate compulsory purchase power, that the proposed use will not be public, that the property will be used for a different purpose, that the property will not be used within a set amount of time, or that the property is not subject to compulsory purchase for that purpose, the landowner can keep his land.²¹⁸ The government must also be careful not to take more land than it

²⁰⁷ The Hawaii Housing Authority is an example. Haw. Rev. Stat. s. 356-18.

²⁰⁸ See eg the Airports Division of the Department of Transportation, Haw. Rev. Stat. s. 261-4(b).

²⁰⁹ See eg the Convention Center Authority, Haw. Rev. Stat. ss. 208X *et seq.*

²¹⁰ *Ibid.* See Title III of the Federal Uniform Relocation Assistance and Real Property Acquisition Act of 1970, 42 USC s. 4604.

²¹¹ See eg Haw. Rev. Stat. s. 101-15.

²¹² See eg Haw. Rev. Stat. s. 101-16.

²¹³ See Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC s. 4604.

²¹⁴ Eugene McQuillin, *Municipal Corporations* (2000, West Group, Chicago), Vol. 11, ss. 32.92 and 32.92c.

²¹⁵ The right of due process, like compensation, derives from the US Constitution's Fifth and Fourteenth Amendments.

²¹⁶ See *In the Matter of the Decision of the State of South Dakota Water Management Board Approving Water Permit No 1791-2*, 351 NW 2d 119 at p 123 (SD 1984).

²¹⁷ *Ibid* See also *Weiner v. State of Nebraska Department of Roads*, 137 NW 2d 852 (Neb. 1965).

²¹⁸ *Santa Cruz County Redevelopment Agency v. Izant*, 37 Cal. Rptr 4th 141 (1995).

needs, and to avoid so publicising the land's eventual condemnation that it lowers the value of the to-be-condemned land. Sometimes the government can prove the necessity for excess condemnation,²¹⁹ but if it ever abandons the use for which the land was initially condemned, statutes often require that the property be resold to the original condemnee.

III. Conclusion

Given the diversity of history, culture and politics in the Asia-Pacific region, it is at one level surprising to find so much similarity among systems of compulsory purchase and town planning/land use controls. Most countries require some sort of public use or purpose for the compulsory acquisition of land, and many provide for compensation. Most countries base their land use controls on some sort of plan or planning process. Most countries require some measure of due process, particularly with respect to compulsory purchase, though all might not necessarily define such due process in the same way. Finally, those countries with a British colonial heritage often owe the structure, if not the content, of their town planning system to England.

One would expect, of course, to find differences, and there are those aplenty. One of the most significant is the absence in most countries of the US concept of a regulatory taking. Compulsory purchase and land use controls are generally regarded as legally separate concepts (as indeed they were in the United States until 1922) and the idea that a regulation, if it goes 'too far' may result in the equivalent of a compulsory physical taking is only slowly taking hold in one or two countries. Equally significant is the dearth of private fee simple ownership in a few countries, with long-term leases serving as a land use control mechanism (along with more traditional controls) as well as the basis for holding and developing private property.

Lastly, in some countries, the mechanics of due process is increasingly the subject of much scrutiny as the infrastructure needs of growing urban (and, in some instances, rural) areas drives the need for major public works projects such as roads, wastewater and water delivery systems, and public educational centres. Much of these will perforce be constructed on private land (or land subject to long-term leases) that is not necessarily viewed as fungible (as, for example, most land is viewed in a relatively new nation like the United States). How the basic public purpose behind compulsory purchase for such facilities can be reconciled with occupation and use of the land for centuries by the same families is of considerable importance to many Asia-Pacific countries seeking to provide fairness and avoid disruption for those citizens who bear the burden of such compulsory purchase for which compensation alone may not be viewed as an adequate remedy.

²¹⁹ David L Callies *et al*, 'Value Capture Policy' (1976) 42 *Planning* 22 (October); AP Nichols, *The Law of Eminent Domain* (3rd edn, 1976, Matthew Bender and Co., New York), Vol. 2, s. 7.516.